

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION) FINAL
FOR BENEFICIAL WATER USE PERMIT) ORDER
97905-41H BY RICHARD E. THOMSON)

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on June 16, 1997. Both Applicant and Objector filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting Beneficial Water Use Permit 097905-41H to appropriate 448.80 gallons per minute up to 483.93 acre-feet per year of the waters of McDonald Creek at a point in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 29. During the period of September 1 through April 30, inclusive of each year, Applicant may appropriate 224.4 gallons per minute up to 239.98 acre-feet of water for fish and wildlife. During the period of May 1 through August 31, inclusive of each year, Applicant may appropriate 448.8 gallons per minute up to 243.95 acre-feet of water for fish and wildlife. The places of use will be three off-stream reservoirs to be located in the NW $\frac{1}{4}$ of Section 29. More precisely, reservoir 1, with a capacity of 11.7 acre-feet, will be located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$; reservoir 2, with a capacity of 12.8 acre-feet, will be located on the dividing line between the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ (E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$); and reservoir 3, with a capacity of 9.7 acre-feet, will be located in the center of the

NW¼, all in Section 29. The means of diversion will be a headgate. The Proposal set forth several conditions to be placed on this permit.

Applicant excepted to Condition B on the basis that it creates an ambiguity in that "impervious material" is not defined. The Department will modify Condition B is amended as follows:

B. Permittee shall line the conveyance ditches and ponds with geosynthetic membranes and the new conveyance channel with bentonite to prevent seepage loss.

Applicant also argues that installing an impervious membrane to the new channel is unnecessary because seepage from the new channel will decrease over time because of the natural armoring. However, Applicant has admitted there will be significant seepage losses during at least the first year of operation and possibly longer. See Applicant's Proposed Finding of Fact 19. Condition B is intended to avoid those initial losses.

Seepage loss associated with this appropriation could be considered waste, Mont. Code Ann. §85-2-101(17)(1995), and may not be permissible in this basin which is closed to consumptive water use. Mont. Code Ann. §85-2-343(1995). The Department believes generally that what might be considered reasonable water loss in an open basin, may not be reasonable in a closed basin. Here, it seems reasonable to require bentonite lining at the outset particularly since Applicant has proposed to take that very measure if after two years the channel shows ten percent

loss. See Applicant's Proposed Finding of Fact 19.

The remainder of Permittee's arguments pertain to what might be the case assuming future permit or change authorization applications are granted. The Department will deal with those applications at the appropriate time, but will not speculate now as to what effect future water rights might have on the system applied for here.

Objector excepted to Finding of Fact 9 on the basis that since the Proposal places the point of diversion in the S $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, Township 1 South, Range 5 East, the 24-inch culvert and check structure should be located in Applicant's diversion channel instead of the present location in the McDonald Creek channel. Generally, that would be the case; however, when Applicant constructed the structure, he believed he was rerouting McDonald Creek and the check structure was installed to ensure Objector would have the water necessary to exercise his water right. Now that the Department has determined the newly constructed channel is a component of the appropriation works to convey water to the ponds, there is no need to move the culvert and check structure since it will adequately serve to deliver water to Objector and other downstream users.

For this review, the Department must accept the Proposal's Findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3) (1995) and Mont. Admin. R. 36.12.229 (1995). The

Department has considered the exceptions and reviewed the record under these standards and the Department finds that the Proposal for Decision is supported by the record and properly applied the law to the facts.

Having given the exception full consideration, the Department of Natural Resources and Conservation adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision for this Final Order. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

FINAL ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 97905-41H is granted to Richard E. Thomson to appropriate 448.80 gallons per minute up to 483.93 acre-feet of the waters of McDonald Creek at a point in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 29. During the period of September 1 through April 30, inclusive of each year, Applicant may appropriate 224.4 gallons per minute up to 239.98 acre-feet of water for fish and wildlife. During the period of May 1 through August 31, inclusive of each year, Applicant may appropriate 448.8 gallons per minute up to 243.95 acre-feet of water for fish and wildlife. The places of use will be three off-stream reservoirs to be located in the NW $\frac{1}{4}$ of Section 29. More precisely, reservoir 1, with a capacity of 11.7 acre-feet, will be located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$; reservoir 2, with a capacity of 12.8 acre-feet, will be located on the dividing line between the

SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ (E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$); and reservoir 3, with a capacity of 9.7 acre-feet, will be located in the center of the NW $\frac{1}{4}$, all in Section 29. The means of diversion will be a headgate.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Permittee shall line the conveyance ditches and ponds with geosynthetic membranes the newly constructed conveyance channel with bentonite to prevent seepage loss.

C. Permittee shall install measuring devices approved by the Department at points designated by the Department above the inlet of Pond 1 and below the outlet of Pond 3 to determine the amount of water needed to replace the evaporation. The evaporation shall be replaced by ground water from the well authorized by Beneficial Water Use Permit 97907-41H.

D. The appropriator shall install a water use measuring device approved by the Department at point designated by the Department to allow the flow rate of water diverted to be recorded. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted, including the period of time, and shall submit the records by November 30 of each year. The regional manager may also request

measurement records at other times of the year. Failure to submit reports may be cause for revocation or modification of the permit. The records must be sent to the Water Resources regional office listed below. Contact them for proper mailing address.

Bozeman Water Resources Regional Office
Phone: 406-586-3136
Fax: 406-586-9726

E. The Permittee shall install a measuring device approved by the Department at a point designated by the Department at or near the diversion of the Objector, or any successor, located in the NW~~1~~/~~4~~SW~~1~~/~~4~~ of Section 29, Township 1 South, Range 5 East, Gallatin County, Montana, and Permittee shall route flows into the old channel of McDonald Creek sufficient for the Objector, or any successor, to exercise his senior water rights.

F. Permittee shall install aerators in the ponds to increase the dissolved oxygen in the event there is not sufficient flow to satisfy the demand of other water users of McDonald Creek and the Permittee's needs.

G. This permit is associated with Permit 97907-41H. They share a portion of the place of use.

H. To meet the requirements of the upper Missouri Basin closure, once filled, the outflow of the ponds must always be equal to or greater than the flow into the pond.

I. To meet the requirements of the upper Missouri Basin closure, water for these storage ponds can only be collected during high spring flows.

J. This right is subject to the condition that there be no

decrease in the source of supply, no disruption in the stream conditions below the point of return and no adverse effect to prior appropriators within the reach of the stream between the point of diversion and point of return.

K. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

L. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.


NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will

transmit a copy of the tape of the oral argument proceedings to the district court.

Dated this 12th day of November, 1997.


Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 13th day of November, 1997, as follows:


Richard E. Thomson
5850 S Broadway
Littleton, CO 80121

Matthew W. Williams
Williams, Jent & Dockins
506 East Babcock
Bozeman, MT 59715

James T. Paugh
1691 Hulbert East Rd
Bozeman, MT 59715

John E. Bloomquist
Doney, Crowley & Bloomquist
P.O. Box 1185
Helena, MT 59624

Scott Compton, Manager
Bozeman Water Resources
Regional Office
151 Evergreen Dr., Suite C
Bozeman, MT 59715


Diane McDuffie
Administrative Assistant

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
97905-41H BY RICHARD E. THOMSON)	DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on March 26, 1997, in Bozeman, Montana, to determine whether a Beneficial Water Use Permit should be granted to Applicant for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1995).

APPEARANCES

Applicant Richard E. Thomson appeared at the hearing by and through counsel, Matthew W. Williams.

Justin Buchanan, partner in the firm of Fluidyne, Inc., appeared at the hearing as a witness for Applicant.

Cordell Pool, engineering intern with Fluidyne, Inc., appeared at the hearing as a witness for Applicant.

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Dr. Gerald Westesen, Professor Emeritus MSU, appeared at the hearing as a witness for Applicant.

Objector James Paugh appeared at the hearing in person and by and through counsel, John E. Bloomquist.

Karen Paugh, daughter of Objector, appeared at the hearing as a witness for Objector.

Pat Ward, son-in-law of Objector, appeared at the hearing as a witness for Objector.

Scott Compton, Manager, and Jan Mack, WRS, both with the Bozeman Regional Water Resources Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing but were not called to testify.

EXHIBITS

Applicant offered 16 exhibits for the record. All except Applicant's Exhibits N, O, and P were accepted without objection. Paughs objected to Exhibits N, O, and P on the basis of relevance. Objector could not see the relevance of these exhibits since the Department has no jurisdiction to decide whether the claimed place of use for subirrigation could be used in an area where there are septic tanks, sewage systems, and

wastewater treatments. The Hearing Examiner reserved a ruling on that objection to be addressed in the Proposal for Decision. The Hearing Examiner understands where counsel for Applicant was going with these exhibits. However, counsel for Objector is correct; the septic tank, sewage system, wastewater treatment, and whether the groundwater level is too high are governed by Gallatin County. Therefore, the objection is sustained. Applicant's Exhibits N, O, and P, are not accepted into the record.

Applicant's Exhibit A is contour map mounted on a two feet by three feet sheet of foam board. This map shows McDonald Creek, the new channel, the location of the proposed ponds, Applicant's proposed point of diversion, Objector's existing point of diversion, Objector's gravel pit pond, several buildings, the locations of Love Lane and Valley Center Road, and the location of the Beck Border Canal.

Applicant's Exhibit B is a graph of flow measurements of McDonald Creek taken from April 21, 1995, to March 20, 1996. This exhibit is also mounted on a two feet by three feet sheet of foam board.

Applicant's Exhibit C is a map of the E~~1~~/~~2~~NE~~1~~/~~4~~ of Section 30, Township 1 South, Range 5 East, Gallatin County, Montana¹ mounted on a two feet by three feet foam board. This map shows the location of Objector's gravel pit pond, the locations of certain buildings, portions of McDonald Creek, the new channel, approximate acreage of certain tracts and parcels of land, and the locations of Love Lane and Valley Center Road. Several ditches were drawn on the map during the hearing.

Applicant's Exhibit D is a copy of an abstract of Water Right Number 41H-W-141018-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit E consists of 17 pages and is a copy of the Master's Report and Order Adopting Master's Report concerning Mr. Paugh's water right on McDonald Creek.

Applicant's Exhibit F is a copy of an objection to the Master's Report for Case No. 41H-220 filed with the Montana Water Court on January 22, 1997, by James T. Paugh to the Water Court

¹Unless otherwise stated all land descriptions in this Proposal are located in Township 1 South, Range 5 East, Gallatin County, Montana.

concerning the reduced flow rate shown on his water right in the temporary preliminary decree.

Applicant's Exhibit G is a copy of the two-page "Order Adopting the Master's Report" filed in the Montana Water Court January 8, 1997.

Applicant's Exhibit H is a copy of the abstract of Water Right Number 41H-W-141019-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit I is a copy of the abstract of Water Right Number 41H-W-141021-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit J is a copy of the abstract of Water Right Number 41H-W-141016-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit K is a copy of the abstract of Water Right Number 41H-W-141017-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit L is a copy of the abstract of Water Right Number 41H-W-141014-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit M is a copy of the abstract of Water Right Number 41H-W-141015-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit Q is a copy of an affidavit filed with Statement of Claim No. 41H-W-141021-00.

Objector offered 18 exhibits for the record. All were accepted without objection.

Objector relied on Applicant's Exhibit A as their first exhibit.

Objector's Exhibit O-2 is a four-page document which is a copy of a Statement of Claim for Existing Water Rights 41H-W-141018 with a copy of an affidavit and a map submitted by James T. Paugh.

Objector's Exhibit O-3 is a copy of the abstract of Claim 41H-W-141018-00.

Objector's Exhibit O-4 is a copy of the two-page abstract of Water Right Number 41H-W-141018-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Objector's Exhibit O-5 consists of 18 pages. The first page is a copy of the Notice of Filing of Master's Report. The next

15 pages contain a copy of the Master's Report. A copy of the Order Adopting Master's Report is on the last two pages.

Objector's Exhibit 0-6 is a four-page document which is a copy of the Notice of Objection and Request for Hearing concerning Claim No. 41H-W-141018-00. The objection was filed with the Montana Water Court on March 6, 1996.

Objector's Exhibit 0-7 is a copy of an objection to the Master's Report for Case No. 41H-220 filed with the Montana Water Court on January 22, 1997, by James T. Paugh to the Water Court concerning the reduced flow rate shown on his water right in the temporary preliminary decree.

Objector's Exhibit 0-8 consists of two pages. The first page is a copy of page 31 of the *Gallatin County Water Resources Survey*. The second page is a copy of page 37 of the aforementioned survey.

Objector did not offer Exhibits 0-9 and 0-10.

Objector's Exhibit 0-11 is a photograph taken by James T. Paugh on October 10, 1996, at 8:30 a.m. This photograph depicts the new diversion for McDonald Creek.

Objector's Exhibit O-12 is a photograph taken by James T. Paugh on October 12, 1996, at 4:02 p.m., depicting the new diversion to the left and the creek to the right.

Objector's Exhibit O-13 is a photograph taken by James T. Paugh on October 12, 1996, at 3:55 p.m., depicting the new channel looking south.

Objector's Exhibit O-14 is a photograph taken by James T. Paugh on October 12, 1996 at 4:10 p.m., depicting McDonald Creek at Mr. Paugh's diversion.

Objector's Exhibit O-15 is a photograph taken by James T. Paugh on October 17, 1996, at 10:30 a.m., looking north at Applicant's pond three as it is filled with water from a well for a test.

Objector's Exhibit O-16 is a photograph taken by James T. Paugh on October 17, 1996, at 10:30 a.m., depicting water pumped from a well into the channel to pond three.

Objector's Exhibit O-17 is a photograph taken by James T. Paugh on September 10, 1996. This photograph was taken just below the proposed creek diversion point looking north toward the proposed ditch.

Objector's Exhibit O-18 is a photograph taken by James T. Paugh on September 10, 1996. This photograph was taken looking south from a place about 100 yards east of upper pump station.

Objector's Exhibit O-19 is a photograph taken by James T. Paugh on September 10, 1996. This photograph was taken looking north from a point about 100 yards east of upper pump station.

Objector's Exhibit O-20 contains two pages which are copies of water right listings by source name by priority date from the Department's database. The source name of interest is McDonald Creek.

Objector's Exhibit O-21 consists of four pages. The first page is a copy of a Notice of Proposed Project concerning the rerouting of McDonald Creek. The second page is a copy of the Team Member Report. The third page is a copy of a contour map and the last page is a copy of the specifications of the new channel.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. An application for beneficial water use permit in the name of and signed by Richard E. Thomson was received by the Department May 10, 1996, at 9:37 a.m. (Department file.)

2. Pertinent portions of the application were published in the *Bozeman Daily Chronicle* on October 16, 1996. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. One timely objection was received by the Department. Applicant was notified of the objection by a letter from the Department dated November 12, 1996. (Department file.)

3. Applicant proposes to appropriate 448.80 gallons per minute up to 483.93 acre-feet of the waters of McDonald Creek at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. During the period of September 1 through April 30, inclusive of each year, Applicant seeks to appropriate 224.4 gallons per minute up to 239.98 acre-feet of water for fish and wildlife. During the period of May 1 through August 31, inclusive of each year, Applicant seeks to appropriate 448.8 gallons per minute up to 243.95 acre-feet of

water for fish and wildlife. The proposed places of use are three off-stream reservoirs to be located in the NW¼ of Section 29. More precisely, reservoir 1, with a capacity of 11.7 acre-feet, would be located in the SE¼SW¼NW¼; reservoir 2, with a capacity of 12.8 acre-feet, would be located on the dividing line between the SE¼SW¼NW¼ and NE¼SW¼NW¼ (E¼SW¼NW¼); and reservoir 3, with a capacity of 9.7 acre-feet, would be located in the center of the NW¼, all in Section 29. The proposed means of diversion is a headgate. (Department file and testimony of Justin Buchanan.)

4. The Department finds that the point of diversion for this appropriation is on McDonald Creek in the S¼SW¼ of Section 29. The application lists the point of diversion as the SE¼SW¼NW¼ of Section 29 on what Applicant describes as a newly constructed channel for McDonald Creek. However, the newly constructed channel did not exist on the date the application was submitted. For this application the newly constructed channel appears to be a component of the appropriation to convey water from McDonald Creek to the ponds for beneficial use. The point of diversion for the appropriation is where this conveyance

channel diverges from the channel of McDonald Creek that existed on the date the application was submitted. (Department file, Objector's Exhibit O-11, testimony of James Paugh and Justin Buchanan.)

5. The portion of newly constructed channel that may extend downstream from the lateral ditch to reconverge with McDonald Creek is not part of this application. (Department file.)

6. Applicant has proven by a preponderance of evidence the proposed use of water, fish and wildlife, is a beneficial use. Applicant is creating a subdivision. Having the ponds in the subdivision would enhance the subdivision and provide recreation for the inhabitants. (Department file, Applicant's Exhibit 1, and testimony of Justin Buchanan.)

7. Applicant has proven by a preponderance of evidence there are unappropriated waters in the source of supply at the point of diversion at times when the water can be put to the use proposed, in the amount Applicant seeks to appropriate and that the amount requested is reasonably available during the period in which Applicant seeks to appropriate. Applicant measured the flow of the stream for one year at points in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$,

approximately the center, NW~~1~~/~~4~~SW~~1~~/~~4~~, and SW~~1~~/~~4~~NW~~1~~/~~4~~ all in Section 29. The measurements were made at first with weirs, but they were destroyed by too much water then measurements were made with flow meters

The flows, in cubic feet per second were:

Date	Flow
April 21, 1995	2.24
May 9, 1995	2.5
June 17, 1995	12.1
July 7, 1995	10.6
August 9, 1995	11.1
September 6, 1995	12.9
October 21, 1995	3.4
December 1, 1995	2.6
January 31, 1996	2.3
February 7, 1996	22
March 20, 1996	3.2

Precipitation records from 1967 to the present were compared with the precipitation of the 1995 - 1996 period when measurements were made and were found to be within five percent which indicate the measured flow rates are an average flow of McDonald Creek except the huge increase in February. That event was caused by a February thaw which generally occurs in April or May. (Department file, Applicant's Exhibit B, and testimony of Justin Buchanan.)

8. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. This new channel as it is now, is not adequate. It is not lined and there is water lost to seepage in the new channel. In this Upper Missouri River closure area, there can be no consumptive use. Mont. Code Ann. § 85-2-343(1995) However, Mr. Buchanan stated during the hearing that Applicant would be willing to line the new channel if necessary. After lining, the channel would be adequate. All evaporation losses from the ponds and channels would be replaced by ground water appropriated under Beneficial Water Use Permit 097907-41H and pond fillings from the creek would occur during high spring flows. The ponds and conveyance channels would be lined with a geosynthetic clay liner to prevent seepage loss. All ponds would be capable of supporting fish with the requested flow rate. (Department file, Applicant's Exhibit A, Objector's Exhibit O-13, and testimony of Justin Buchanan and James Paugh.)

9. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator would not be adversely affected. Applicant would install a 24-inch culvert in the

McDonald Creek channel and a check structure in the new channel. The check structure would be used to route the water into the McDonald Creek channel so that Objector would have the water necessary to exercise his water right.

Objector's headgate at his point of diversion is approximately one and one-half feet above the creek channel. In order to divert water onto his property, Objector must dam a culvert approximately 150 feet downstream of his diversion so the water will back up in the channel high enough for the water to flow into the headgate. Applicant would be willing to fund or assist Objector to increase the efficiency of his diversion by placing another headgate much closer, immediately downstream of Objector's existing headgate diversion. Applicant would also fund the lowering of the diversion culvert. (Testimony of James Paugh and Justin Buchanan.)

10. Applicant has proven by a preponderance of evidence the proposed use would not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. There are no pending projects on this source for

which permits have been issued or for which water has been reserved under state law. (Department file.)

11. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit.

12. Applicant has proven by a preponderance of evidence he has possessory interest in the property where the water is to be put to beneficial use. Applicant owns the property where the water would be put to beneficial use. (Department file.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicant has met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 12. Mont. Code Ann § 85-2-311 (1995).

3. Applicant does not have a protectable interest under this permit in any water that may flow into that portion of the newly constructed channel that may extend downstream from the lateral ditch to reconverge with McDonald Creek. In the same vein, the Department does not have jurisdiction under this application to require sealing or lining of that portion of the channel. However, Applicant may be wasting water in violation of Mont. Code Ann. § 85-2-114 (1995) if water is lost through seepage from the channel.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 97905-41H is granted to Richard E. Thomson to appropriate 448.80 gallons per minute up to 483.93 acre-feet of the waters of McDonald Creek at a point in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 29. During the period of

September 1 through April 30, inclusive of each year, Applicant may appropriate 224.4 gallons per minute up to 239.98 acre-feet of water for fish and wildlife. During the period of May 1 through August 31, inclusive of each year, Applicant may appropriate 448.8 gallons per minute up to 243.95 acre-feet of water for fish and wildlife. The places of use will be three off-stream reservoirs to be located in the NW $\frac{1}{4}$ of Section 29. More precisely, reservoir 1, with a capacity of 11.7 acre-feet, will be located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$; reservoir 2, with a capacity of 12.8 acre-feet, will be located on the dividing line between the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ (E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$); and reservoir 3, with a capacity of 9.7 acre-feet, will be located in the center of the NW $\frac{1}{4}$, all in Section 29. The means of diversion will be a headgate.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Permittee shall line the conveyance ditches, including the new channel, and all three ponds with an impervious material to prevent seepage loss.

C. Permittee shall install measuring devices approved by the regional manager at points designated by the regional office on the inlet of Pond 1 and the outlet of Pond 3 to determine the amount of water needed to replace the evaporation. The evaporation shall be replaced by ground water from the well authorized by Beneficial Water Use Permit 97907-41H.

D. The appropriator shall install a water use measuring device approved by the regional manager at point designated by the regional office to allow the flow rate of water diverted to be recorded. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted, including the period of time, and shall submit the records by November 30 of each year. The regional manager may also request measurement records at other times of the year. Failure to submit reports may be cause for revocation or modification of the

permit. The records must be sent to the Water Resources regional office at the address below.

Bozeman Water Resources
Regional Office
151 Evergreen Dr. Suite C
Bozeman, MT 59715

E. The Permittee shall install a measuring device approved by the regional manager at a point designated by the regional office at or near the diversion of the Objector, or any successor, located in the NW~~1~~⁴/₄SW⁴/₄ of Section 29, Township 1 South, Range 5 East, Gallatin County, Montana, and Permittee shall route flows into the old channel of McDonald Creek sufficient for the Objector, or any successor, to exercise his senior water rights.

F. Permittee shall install aerators in the ponds to increase the dissolved oxygen in the event there is not sufficient flow to satisfy the demand of other water users of McDonald Creek and the Permittee's needs.

G. This permit is associated with Permit 97907-41H. They share a portion of the place of use.

H. To meet the requirements of the upper Missouri Basin closure, once filled, the outflow of the ponds must always be equal to or greater than the flow into the pond.

I. To meet the requirements of the upper Missouri Basin closure, water for these storage ponds can only be collected during high spring flows.

J. This right is subject to the condition that there be no decrease in the source of supply, no disruption in the stream conditions below the point of return and no adverse effect to prior appropriators within the reach of the stream between the point of diversion and point of return.

K. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

L. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a

Water Right Transfer Certificate, Form 608, pursuant to Mont.

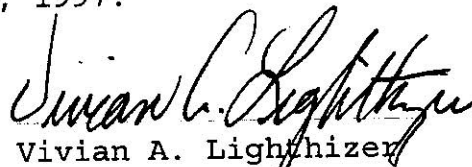
Code Ann. § 85-2-424.

NOTICE

This Proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. Any exception that contains obscene, lewd, profane, or abusive language shall be returned to the sender. The exceptions must be filed and served on all parties within 20 days after the Proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time for filing exceptions, and due consideration of timely exceptions, responses and briefs.

Dated the 16th day of June, 1997.



Vivian A. Lighthizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
And Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 16th day of June, 1997, as follows:

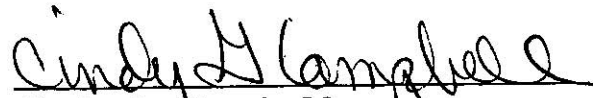
Richard E. Thomson
5850 S Broadway
Littleton, CO 80121

Matthew W. Williams
Williams, Jent & Dockins
506 East Babcock
Bozeman, MT 59715

James T. Paugh
1691 Hulbert East Rd
Bozeman, MT 59715

John E. Bloomquist
Doney, Crowley & Bloomquist
P.O. Box 1185
Helena, MT 59624

Scott Compton, Manager
Bozeman Water Resources
Regional Office
151 Evergreen Dr., Suite C
Bozeman, MT 59715


Cindy G. Campbell
Hearings Unit Legal Assistant

measurement records at other times of the year. Failure to submit reports may be cause for revocation or modification of the permit. The records must be sent to the Water Resources regional office listed below. Contact them for proper mailing address.

Bozeman Water Resources Regional Office
Phone: 406-586-3136
Fax: 406-586-9726

E. The Permittee shall install a measuring device approved by the Department at a point designated by the Department at or near the diversion of the Objector, or any successor, located in the NW¼NW¼SW¼ of Section 29, Township 1 South, Range 5 East, Gallatin County, Montana, and Permittee shall route flows into the old channel of McDonald Creek sufficient for the Objector, or any successor, to exercise his senior water rights.

F. Permittee shall install aerators in the ponds to increase the dissolved oxygen in the event there is not sufficient flow to satisfy the demand of other water users of McDonald Creek and the Permittee's needs.

G. This permit is associated with Permit 97907-41H. They share a portion of the place of use.

H. To meet the requirements of the upper Missouri Basin closure, once filled, the outflow of the ponds must always be equal to or greater than the flow into the pond.

I. To meet the requirements of the upper Missouri Basin closure, water for these storage ponds can only be collected during high spring flows.

J. This right is subject to the condition that there be no

decrease in the source of supply, no disruption in the stream conditions below the point of return and no adverse effect to prior appropriators within the reach of the stream between the point of diversion and point of return.

K. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

L. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

NOTICE

The Department's Final Order may be appeared in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will

transmit a copy of the tape of the oral argument proceedings to the district court.

Dated this 12th day of November, 1997.



Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 13th day of November, 1997, as follows:

Richard E. Thomson
5850 S Broadway
Littleton, CO 80121

Matthew W. Williams
Williams, Jent & Dockins
506 East Babcock
Bozeman, MT 59715

James T. Paugh
1691 Hulbert East Rd
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Helena, MT 59624

Scott Compton, Manager
Bozeman Water Resources
Regional Office
151 Evergreen Dr., Suite C
Bozeman, MT 59715



Diane McDuffie
Administrative Assistant

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
97905-41H BY RICHARD E. THOMSON)	DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on March 26, 1997, in Bozeman, Montana, to determine whether a Beneficial Water Use Permit should be granted to Applicant for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1995).

APPEARANCES

Applicant Richard E. Thomson appeared at the hearing by and through counsel, Matthew W. Williams.

Justin Buchanan, partner in the firm of Fluidyne, Inc., appeared at the hearing as a witness for Applicant.

Cordell Pool, engineering intern with Fluidyne, Inc., appeared at the hearing as a witness for Applicant.

CASE # 97905

Dr. Gerald Westesen, Professor Emeritus MSU, appeared at the hearing as a witness for Applicant.

Objector James Paugh appeared at the hearing in person and by and through counsel, John E. Bloomquist.

Karen Paugh, daughter of Objector, appeared at the hearing as a witness for Objector.

Pat Ward, son-in-law of Objector, appeared at the hearing as a witness for Objector.

Scott Compton, Manager, and Jan Mack, WRS, both with the Bozeman Regional Water Resources Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing but were not called to testify.

EXHIBITS

Applicant offered 16 exhibits for the record. All except Applicant's Exhibits N, O, and P were accepted without objection. Paughs objected to Exhibits N, O, and P on the basis of relevance. Objector could not see the relevance of these exhibits since the Department has no jurisdiction to decide whether the claimed place of use for subirrigation could be used in an area where there are septic tanks, sewage systems, and

wastewater treatments. The Hearing Examiner reserved a ruling on that objection to be addressed in the Proposal for Decision. The Hearing Examiner understands where counsel for Applicant was going with these exhibits. However, counsel for Objector is correct; the septic tank, sewage system, wastewater treatment, and whether the groundwater level is too high are governed by Gallatin County. Therefore, the objection is sustained. Applicant's Exhibits N, O, and P, are not accepted into the record.

Applicant's Exhibit A is contour map mounted on a two feet by three feet sheet of foam board. This map shows McDonald Creek, the new channel, the location of the proposed ponds, Applicant's proposed point of diversion, Objector's existing point of diversion, Objector's gravel pit pond, several buildings, the locations of Love Lane and Valley Center Road, and the location of the Beck Border Canal.

Applicant's Exhibit B is a graph of flow measurements of McDonald Creek taken from April 21, 1995, to March 20, 1996. This exhibit is also mounted on a two feet by three feet sheet of foam board.

Applicant's Exhibit C is a map of the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 30, Township 1 South, Range 5 East, Gallatin County, Montana¹ mounted on a two feet by three feet foam board. This map shows the location of Objector's gravel pit pond, the locations of certain buildings, portions of McDonald Creek, the new channel, approximate acreage of certain tracts and parcels of land, and the locations of Love Lane and Valley Center Road. Several ditches were drawn on the map during the hearing.

Applicant's Exhibit D is a copy of an abstract of Water Right Number 41H-W-141018-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit E consists of 17 pages and is a copy of the Master's Report and Order Adopting Master's Report concerning Mr. Paugh's water right on McDonald Creek.

Applicant's Exhibit F is a copy of an objection to the Master's Report for Case No. 41H-220 filed with the Montana Water Court on January 22, 1997, by James T. Paugh to the Water Court

¹Unless otherwise stated all land descriptions in this Proposal are located in Township 1 South, Range 5 East, Gallatin County, Montana.

concerning the reduced flow rate shown on his water right in the temporary preliminary decree.

Applicant's Exhibit G is a copy of the two-page "Order Adopting the Master's Report" filed in the Montana Water Court January 8, 1997.

Applicant's Exhibit H is a copy of the abstract of Water Right Number 41H-W-141019-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit I is a copy of the abstract of Water Right Number 41H-W-141021-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit J is a copy of the abstract of Water Right Number 41H-W-141016-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit K is a copy of the abstract of Water Right Number 41H-W-141017-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit L is a copy of the abstract of Water Right Number 41H-W-141014-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit M is a copy of the abstract of Water Right Number 41H-W-141015-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Applicant's Exhibit Q is a copy of an affidavit filed with Statement of Claim No. 41H-W-141021-00.

Objector offered 18 exhibits for the record. All were accepted without objection.

Objector relied on Applicant's Exhibit A as their first exhibit.

Objector's Exhibit O-2 is a four-page document which is a copy of a Statement of Claim for Existing Water Rights 41H-W-141018 with a copy of an affidavit and a map submitted by James T. Paugh.

Objector's Exhibit O-3 is a copy of the abstract of Claim 41H-W-141018-00.

Objector's Exhibit O-4 is a copy of the two-page abstract of Water Right Number 41H-W-141018-00 as stated in the Temporary Preliminary Decree of Gallatin River Basin, Basin 41H.

Objector's Exhibit O-5 consists of 18 pages. The first page is a copy of the Notice of Filing of Master's Report. The next

15 pages contain a copy of the Master's Report. A copy of the Order Adopting Master's Report is on the last two pages.

Objector's Exhibit 0-6 is a four-page document which is a copy of the Notice of Objection and Request for Hearing concerning Claim No. 41H-W-141018-00. The objection was filed with the Montana Water Court on March 6, 1996.

Objector's Exhibit 0-7 is a copy of an objection to the Master's Report for Case No. 41H-220 filed with the Montana Water Court on January 22, 1997, by James T. Paugh to the Water Court concerning the reduced flow rate shown on his water right in the temporary preliminary decree.

Objector's Exhibit 0-8 consists of two pages. The first page is a copy of page 31 of the Gallatin County Water Resources Survey. The second page is a copy of page 37 of the aforementioned survey.

Objector did not offer Exhibits 0-9 and 0-10.

Objector's Exhibit 0-11 is a photograph taken by James T. Paugh on October 10, 1996, at 8:30 a.m. This photograph depicts the new diversion for McDonald Creek.

Objector's Exhibit O-12 is a photograph taken by James T. Paugh on October 12, 1996, at 4:02 p.m., depicting the new diversion to the left and the creek to the right.

Objector's Exhibit O-13 is a photograph taken by James T. Paugh on October 12, 1996, at 3:55 p.m., depicting the new channel looking south.

Objector's Exhibit O-14 is a photograph taken by James T. Paugh on October 12, 1996 at 4:10 p.m., depicting McDonald Creek at Mr. Paugh's diversion.

Objector's Exhibit O-15 is a photograph taken by James T. Paugh on October 17, 1996, at 10:30 a.m., looking north at Applicant's pond three as it is filled with water from a well for a test.

Objector's Exhibit O-16 is a photograph taken by James T. Paugh on October 17, 1996, at 10:30 a.m., depicting water pumped from a well into the channel to pond three.

Objector's Exhibit O-17 is a photograph taken by James T. Paugh on September 10, 1996. This photograph was taken just below the proposed creek diversion point looking north toward the proposed ditch.

Objector's Exhibit O-18 is a photograph taken by James T. Paugh on September 10, 1996. This photograph was taken looking south from a place about 100 yards east of upper pump station.

Objector's Exhibit O-19 is a photograph taken by James T. Paugh on September 10, 1996. This photograph was taken looking north from a point about 100 yards east of upper pump station.

Objector's Exhibit O-20 contains two pages which are copies of water right listings by source name by priority date from the Department's database. The source name of interest is McDonald Creek.

Objector's Exhibit O-21 consists of four pages. The first page is a copy of a Notice of Proposed Project concerning the rerouting of McDonald Creek. The second page is a copy of the Team Member Report. The third page is a copy of a contour map and the last page is a copy of the specifications of the new channel.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. An application for beneficial water use permit in the name of and signed by Richard E. Thomson was received by the Department May 10, 1996, at 9:37 a.m. (Department file.)

2. Pertinent portions of the application were published in the *Bozeman Daily Chronicle* on October 16, 1996. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. One timely objection was received by the Department. Applicant was notified of the objection by a letter from the Department dated November 12, 1996. (Department file.)

3. Applicant proposes to appropriate 448.80 gallons per minute up to 483.93 acre-feet of the waters of McDonald Creek at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. During the period of September 1 through April 30, inclusive of each year, Applicant seeks to appropriate 224.4 gallons per minute up to 239.98 acre-feet of water for fish and wildlife. During the period of May 1 through August 31, inclusive of each year, Applicant seeks to appropriate 448.8 gallons per minute up to 243.95 acre-feet of

water for fish and wildlife. The proposed places of use are three off-stream reservoirs to be located in the NW¼ of Section 29. More precisely, reservoir 1, with a capacity of 11.7 acre-feet, would be located in the SE¼SW¼NW¼; reservoir 2, with a capacity of 12.8 acre-feet, would be located on the dividing line between the SE¼SW¼NW¼ and NE¼SW¼NW¼ (E¼SW¼NW¼); and reservoir 3, with a capacity of 9.7 acre-feet, would be located in the center of the NW¼, all in Section 29. The proposed means of diversion is a headgate. (Department file and testimony of Justin Buchanan.)

4. The Department finds that the point of diversion for this appropriation is on McDonald Creek in the S¼SW¼ of Section 29. The application lists the point of diversion as the SE¼SW¼NW¼ of Section 29 on what Applicant describes as a newly constructed channel for McDonald Creek. However, the newly constructed channel did not exist on the date the application was submitted. For this application the newly constructed channel appears to be a component of the appropriation to convey water from McDonald Creek to the ponds for beneficial use. The point of diversion for the appropriation is where this conveyance

channel diverges from the channel of McDonald Creek that existed on the date the application was submitted. (Department file, Objector's Exhibit O-11, testimony of James Paugh and Justin Buchanan.)

5. The portion of newly constructed channel that may extend downstream from the lateral ditch to reconverge with McDonald Creek is not part of this application. (Department file.)

6. Applicant has proven by a preponderance of evidence the proposed use of water, fish and wildlife, is a beneficial use. Applicant is creating a subdivision. Having the ponds in the subdivision would enhance the subdivision and provide recreation for the inhabitants. (Department file, Applicant's Exhibit 1, and testimony of Justin Buchanan.)

7. Applicant has proven by a preponderance of evidence there are unappropriated waters in the source of supply at the point of diversion at times when the water can be put to the use proposed, in the amount Applicant seeks to appropriate and that the amount requested is reasonably available during the period in which Applicant seeks to appropriate. Applicant measured the flow of the stream for one year at points in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$,

approximately the center, NW~~1~~/~~4~~SW~~1~~/~~4~~, and SW~~1~~/~~4~~NW~~1~~/~~4~~ all in Section 29. The measurements were made at first with weirs, but they were destroyed by too much water then measurements were made with flow meters

The flows, in cubic feet per second were:

Date	Flow
April 21, 1995	2.24
May 9, 1995	2.5
June 17, 1995	12.1
July 7, 1995	10.6
August 9, 1995	11.1
September 6, 1995	12.9
October 21, 1995	3.4
December 1, 1995	2.6
January 31, 1996	2.3
February 7, 1996	22
March 20, 1996	3.2

Precipitation records from 1967 to the present were compared with the precipitation of the 1995 - 1996 period when measurements were made and were found to be within five percent which indicate the measured flow rates are an average flow of McDonald Creek except the huge increase in February. That event was caused by a February thaw which generally occurs in April or May. (Department file, Applicant's Exhibit B, and testimony of Justin Buchanan.)

8. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. This new channel as it is now, is not adequate. It is not lined and there is water lost to seepage in the new channel. In this Upper Missouri River closure area, there can be no consumptive use. Mont. Code Ann. § 85-2-343(1995) However, Mr. Buchanan stated during the hearing that Applicant would be willing to line the new channel if necessary. After lining, the channel would be adequate. All evaporation losses from the ponds and channels would be replaced by ground water appropriated under Beneficial Water Use Permit 097907-41H and pond fillings from the creek would occur during high spring flows. The ponds and conveyance channels would be lined with a geosynthetic clay liner to prevent seepage loss. All ponds would be capable of supporting fish with the requested flow rate. (Department file, Applicant's Exhibit A, Objector's Exhibit O-13, and testimony of Justin Buchanan and James Paugh.)

9. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator would not be adversely affected. Applicant would install a 24-inch culvert in the

McDonald Creek channel and a check structure in the new channel. The check structure would be used to route the water into the McDonald Creek channel so that Objector would have the water necessary to exercise his water right.

Objector's headgate at his point of diversion is approximately one and one-half feet above the creek channel. In order to divert water onto his property, Objector must dam a culvert approximately 150 feet downstream of his diversion so the water will back up in the channel high enough for the water to flow into the headgate. Applicant would be willing to fund or assist Objector to increase the efficiency of his diversion by placing another headgate much closer, immediately downstream of Objector's existing headgate diversion. Applicant would also fund the lowering of the diversion culvert. (Testimony of James Paugh and Justin Buchanan.)

10. Applicant has proven by a preponderance of evidence the proposed use would not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. There are no pending projects on this source for

which permits have been issued or for which water has been reserved under state law. (Department file.)

11. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit.

12. Applicant has proven by a preponderance of evidence he has possessory interest in the property where the water is to be put to beneficial use. Applicant owns the property where the water would be put to beneficial use. (Department file.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicant has met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 12. Mont. Code Ann § 85-2-311 (1995).

3. Applicant does not have a protectable interest under this permit in any water that may flow into that portion of the newly constructed channel that may extend downstream from the lateral ditch to reconverge with McDonald Creek. In the same vein, the Department does not have jurisdiction under this application to require sealing or lining of that portion of the channel. However, Applicant may be wasting water in violation of Mont. Code Ann. § 85-2-114 (1995) if water is lost through seepage from the channel.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 97905-41H is granted to Richard E. Thomson to appropriate 448.80 gallons per minute up to 483.93 acre-feet of the waters of McDonald Creek at a point in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 29. During the period of

September 1 through April 30, inclusive of each year, Applicant may appropriate 224.4 gallons per minute up to 239.98 acre-feet of water for fish and wildlife. During the period of May 1 through August 31, inclusive of each year, Applicant may appropriate 448.8 gallons per minute up to 243.95 acre-feet of water for fish and wildlife. The places of use will be three off-stream reservoirs to be located in the NW $\frac{1}{4}$ of Section 29. More precisely, reservoir 1, with a capacity of 11.7 acre-feet, will be located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$; reservoir 2, with a capacity of 12.8 acre-feet, will be located on the dividing line between the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ (E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$); and reservoir 3, with a capacity of 9.7 acre-feet, will be located in the center of the NW $\frac{1}{4}$, all in Section 29. The means of diversion will be a headgate.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Permittee shall line the conveyance ditches, including the new channel, and all three ponds with an impervious material to prevent seepage loss.

C. Permittee shall install measuring devices approved by the regional manager at points designated by the regional office on the inlet of Pond 1 and the outlet of Pond 3 to determine the amount of water needed to replace the evaporation. The evaporation shall be replaced by ground water from the well authorized by Beneficial Water Use Permit 97907-41H.

D. The appropriator shall install a water use measuring device approved by the regional manager at point designated by the regional office to allow the flow rate of water diverted to be recorded. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted, including the period of time, and shall submit the records by November 30 of each year. The regional manager may also request measurement records at other times of the year. Failure to submit reports may be cause for revocation or modification of the

permit. The records must be sent to the Water Resources regional office at the address below.

Bozeman Water Resources
Regional Office
151 Evergreen Dr. Suite C
Bozeman, MT 59715

E. The Permittee shall install a measuring device approved by the regional manager at a point designated by the regional office at or near the diversion of the Objector, or any successor, located in the NW~~1~~/~~4~~SW~~1~~/~~4~~ of Section 29, Township 1 South, Range 5 East, Gallatin County, Montana, and Permittee shall route flows into the old channel of McDonald Creek sufficient for the Objector, or any successor, to exercise his senior water rights.

F. Permittee shall install aerators in the ponds to increase the dissolved oxygen in the event there is not sufficient flow to satisfy the demand of other water users of McDonald Creek and the Permittee's needs.

G. This permit is associated with Permit 97907-41H. They share a portion of the place of use.

H. To meet the requirements of the upper Missouri Basin closure, once filled, the outflow of the ponds must always be equal to or greater than the flow into the pond.

I. To meet the requirements of the upper Missouri Basin closure, water for these storage ponds can only be collected during high spring flows.

J. This right is subject to the condition that there be no decrease in the source of supply, no disruption in the stream conditions below the point of return and no adverse effect to prior appropriators within the reach of the stream between the point of diversion and point of return.

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L. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a

Water Right Transfer Certificate, Form 608, pursuant to Mont.

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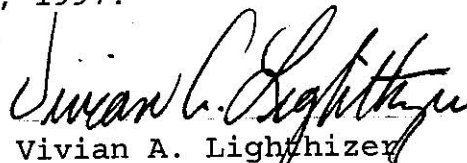
NOTICE

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Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time for filing exceptions, and due consideration of timely exceptions, responses and briefs.

Dated the 16th day of June, 1997.



Vivian A. Lighthizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
And Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 16th day of June, 1997, as follows:

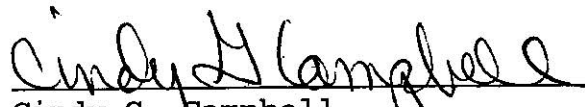
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